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No. 06-808

In the Supreme Court of the United States

JOHN DOE, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
MARK B. STERN
ALISA B. KLEIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals, after considering its prior decision from which this Court denied certiorari, correctly held that petitioners, a class of current and former Department of Justice attorneys, cannot obtain an award of hourly overtime compensation for work performed between 1992 and 1999, because the work was not ordered or approved in writing by an authorized official, as required by a regulation that implements the Federal Employees Pay Act of 1945.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-24a, 38a-66a) are reported at 463 F.3d 1314 and 372 F.3d 1347. The opinions of the Court of Federal Claims (Pet. App. 25a-37a, 67a-96a) are reported at 63 Fed. Cl. 798 and 54 Fed. Cl. 404.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2006. The petition for a writ of certiorari was filed on December 8, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Employees Pay Act of 1945 (FEPA) to address the compensation of federal

employees in the post-war environment. The provision at issue governs hourly overtime compensation. It states:

> For full-time, part-time and intermittent tours of duty, hours of work *officially ordered or approved* in excess of 40 hours in an administrative workweek, or * * * in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for * * * at [specified rates].

5 U.S.C. 5542(a) (2000 & Supp. IV 2004) (emphasis added).

The FEPA expressly delegated rulemaking authority to the Civil Service Commission. FEPA, ch. 212, § 605, 59 Stat. 304. Days after the FEPA became law, the Civil Service Commission issued implementing regulations that were approved by the President in Executive Order No. 9578, 3 C.F.R. 86 (1945). Section 401(c) of those regulations provided that compensable overtime must be officially ordered or approved in writing by an authorized official:

> No overtime in excess of the administrative workweek shall be ordered or approved except in writing by an officer or employee to whom such authority has been specifically delegated by the head of the department or independent establishment or agency, or Government-owned or controlled corporation.

Exec. Order No. 9578, 3 C.F.R. 86 (1945).

In 1968, the Commission revised its regulations but "ma[de] no substantive changes." 33 Fed. Reg. 12,402 (1968). The revised regulations were adopted verbatim by the Office of Personnel Management (OPM), which supplanted the Civil Service Commission and has been granted express authority to prescribe regulations to

administer the FEPA. See 5 U.S.C. 5548. The OPM regulation at issue provides:

> Overtime work in excess of any included in a regularly scheduled administrative workweek may be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated.

5 C.F.R. 550.111(c).

In 1999, in response to this litigation, Congress enacted a statute barring the payment of overtime compensation to Department of Justice (Department or DOJ) attorneys for work performed after the enactment of that legislation. See Department of Justice Appropriations Act, 2000, Pub. L. No. 106-113, § 1000a, 113 Stat. 1501A-21 (5 U.S.C. 5541 note); see Pet. App. 39a n.1.[1]

2. Petitioners are a class of more than 9000 present and former Department of Justice attorneys who filed this Tucker Act lawsuit in 1998. C.A. App. 232-233. The

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[1] The 1999 legislation provides:

> (a) None of the funds made available by this or any other Act may be used to pay premium pay under title 5, United States Code, sections 5542-5549, to any individual employed as an attorney, including an Assistant United States Attorney, in the Department of Justice for any work performed on or after the date of the enactment of this Act [Nov. 29, 1999].
>
> (b) Notwithstanding any other provision of law, neither the United States nor any individual or entity acting on its behalf shall be liable for premium pay under title 5, United States Code, sections 5542-5549, for any work performed on or after the date of the enactment of this Act [Nov. 29, 1999] by any individual employed as an attorney in the Department of Justice, including an Assistant United States Attorney.

113 Stat. 1501A-21.

complaint alleged that "because defendant expected, encouraged, or induced plaintiffs to work substantial amounts of overtime and had knowledge that plaintiffs work substantial amounts of overtime, [it] authorized and approved the overtime under 5 U.S.C. § 5542." *Id.* at 246.

Following discovery, the Court of Federal Claims granted summary judgment with respect to liability for the entire plaintiff class. Pet. App. 67a-96a. After recognizing that the plaintiff class had received no explicit orders or approvals, written or otherwise, to perform particular work in excess of a 40-hour week, *id.* at 77a, the court declared that "[t]he question in this case is whether less than explicit orders or approvals suffice," *id.* at 78a.

The court answered that question in the affirmative. It observed that the Court of Claims had "taken almost every conceivable position with regard to overtime." Pet. App. 78a (quoting *Anderson* v. *United States*, 201 Ct. Cl. 660, 675 (1973) (Skelton, J., dissenting)). The trial court recognized that decisions of the Court of Claims in the years following enactment of the FEPA would not have permitted overtime compensation in this litigation. *Id.* at 79a. It concluded, however, that beginning with *Anderson* v. *United States*, 136 Ct. Cl. 365 (1956), the cases had moved toward the use of "more equitable considerations to decide overtime pay claims against the Government." Pet. App. 79a.

The court found evidence that the Department had a "culture" of expecting overtime in the deposition testimony of Stephen R. Colgate, the Assistant Attorney General for Administration, who was "the only person who had authority to order or approve overtime for the entire Class." Pet. App. 87a-88a. The court believed

that Colgate's "understanding of the 'culture' of the Department was that attorneys were expected to work overtime when necessary to complete their tasks." *Id.* at 87a. The court found additional evidence of the Department's culture in the U.S. Attorney Manual and various other documents. *Id.* at 88a-93a.

The court thus entered summary judgment for the plaintiff class with respect to liability. Pet. App. 95a-96a. It indicated that in subsequent damages proceedings, a class member would be entitled to recover if he could show "that what he [did was] worth doing, and [was] reasonably calculated to promote the end for which he [was] employed." *Id.* at 95a (quoting *Anderson*, 136 Ct. Cl. at 367).

3. On the government's interlocutory appeal, a unanimous panel of the Federal Circuit (Rader, Bryson, and Dyk, J.J.) reversed. Pet. App. 38a-66a. "Because the overtime here was not officially ordered or approved in writing as required by the [OPM] regulation," the court held that "the plaintiffs were not entitled to compensation under FEPA." *Id.* at 38a.

The court of appeals concluded that the Court of Claims' *Anderson* line of cases could not be reconciled with this Court's decisions in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981) (per curiam), and *OPM* v. *Richmond*, 496 U.S. 414 (1990). Pet. App. 49a-53a. *Hansen*, the court noted, established that "[a] court is no more authorized to overlook [a] valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits." *Id.* at 51a (quoting *Hansen*, 450 U.S. at 790). The *Anderson* line of cases, by contrast, had refused to give effect to the OPM regulation "because it added a procedural writing requirement to the substantive requirements of FEPA,"

a mode of analysis that could not survive *Hansen*. *Id.* at 49a.

The court explained that the *Anderson* line of cases "fares no better if it is viewed as resting on 'equitable' considerations," because "*Hansen* directly held that such considerations could not impose liability on the government, a result reinforced in [*Richmond*]." Pet. App. 52a (internal citation omitted). The court observed that *Richmond*, relying on *Hansen*, "rejected the plaintiff's estoppel claim because 'the equitable doctrine of estoppel cannot grant [the plaintiff] a money remedy that Congress has not authorized.'" *Ibid.* (quoting *Richmond*, 496 U.S. at 426, 429).

The court rejected petitioners' other challenges to the validity of the OPM regulation. It observed that Congress authorized OPM to prescribe regulations "necessary for the administration" of FEPA, 5 U.S.C. 5548(a), a grant of authority that allows the agency to fill statutory gaps. Pet. App. 53a-54a. The court held that the regulation reasonably implemented FEPA's directive that compensation be limited to extra hours of work that were "officially ordered or approved." *Id.* 55a-61a. The court stressed that the regulation, which was issued by the Civil Service Commission almost contemporaneously with the enactment of the statute, *id.* at 61a, was directly responsive to Congress's concern that there be adequate controls over paid overtime to ensure that the Treasury did not face unanticipated liabilities. *Id.* at 60a-61a.

After rejecting petitioners' challenge to the validity of the regulation, the court of appeals held that the regulation's writing requirement was not satisfied in this case. Pet. App. 62a-65a. The court observed that "the vast majority of the writings cited by the plaintiffs were

not written by officials with proper delegated authority to 'officially order[] or approve[],' 5 U.S.C. § 5542(a), overtime." *Id.* at 62a (brackets in original). Moreover, the court explained that "even those writings that were arguably issued by officials who were arguably authorized to order overtime are not orders or approvals within the meaning of the statute and regulation." *Id.* at 63a.

The court rejected petitioners' heavy reliance on the U.S. Attorney Manual. Pet. App. 62a-63a. Petitioners relied on a portion of the Manual stating that Assistant United States Attorneys "are professionals and should expect to work in excess of regular hours without overtime premium pay." *Id.* at 64a. The court explained that the Manual thereby "instructs attorneys not to expect overtime compensation rather than instructing them to work particular amounts of overtime." *Ibid.* Further, the court explained that the Manual "repeatedly emphasizes the following two directives: 'overtime under 5 U.S.C. § 5542 must be approved in writing, in advance, by a person authorized to do so' and 'U.S. Attorneys are not authorized to approve overtime for attorney personnel.'" *Ibid.* (quoting *U.S. Attorney Manual* (1988) and *ibid.* (1992)). Thus, the Manual indicates, "if anything, that the plaintiffs' overtime work was not officially ordered or approved." *Ibid.*

The court found the other documents cited by the petitioners to be "even less supportive" of their claims. Pet. App. 64a. For example, the court explained that the maintenance of case management records showing hours worked beyond the 40-hour workweek "may indicate official awareness of the overtime worked, but it does not provide prior written authorization or approval of such work." *Id.* at 65a.

The court of appeals stressed that it was not "countenancing any effort by DOJ or any other agency to evade the requirements of FEPA and the OPM regulation." Pet. App. 65a. "If an adverse personnel action were taken against an employee who declined to work uncompensated overtime, that action might well be found to be invalid." *Ibid.* The court emphasized, however, that "that is not a ground for awarding overtime compensation that was not ordered and approved in strict compliance with the regulation." *Id.* at 65a-66a. Thus, the court reversed the decision of the trial court and held that summary judgment should be entered for the government. *Id.* at 38a, 66a.

4. The court of appeals denied a petition for rehearing and rehearing en banc, without recorded dissent. See Pet. App. 27a.

5. This Court denied a petition for a writ of certiorari. See *Doe* v. *United States*, 125 S. Ct. 1591 (2005) (No. 04-742).

6. On remand, the Court of Federal Claims entered summary judgment for the government and dismissed the complaint. See Pet. App. 9a-10a. Petitioners moved for reconsideration of that order, and argued that the court of appeals' ruling on their claims for overtime compensation under Section 5542 did not bar them from pursuing: alternative arguments for overtime compensation under 5 U.S.C. 5542 (2000 & Supp. IV 2004); claims for holiday work pay under 5 U.S.C. 5546(b); and claims for administratively uncontrollable overtime (AUO) pay under 5 U.S.C. 5545(c)(2). Pet. App. 10a.

The trial court denied the motion for reconsideration. Pet. App. 25a-37a. It held in part that petitioners' "alternative" arguments were precluded by the court of appeals' holding that overtime must be ordered or ap-

proved in writing by an authorized official to be compensable. *Id.* at 33a-35a. The court also noted that the precedents relied on by the court of appeals were decided before the initiation of this litigation. *Id.* at 36a.

7. On petitioners' appeal, a unanimous panel of the Federal Circuit (Rader, Schall, and Prost, J.J.) affirmed. Pet. App. 1a-24a. The court of appeals held that petitioners' "alternative" arguments for overtime compensation under Section 5542 were foreclosed by its previous ruling. *Id.* at 10a-14a. In particular, the court rejected the contention that the government could be directed to pay compensation for overtime that was not ordered or approved in writing by an authorized official, as required by the OPM regulation, if petitioners could show that the Department had not implemented a workable system for authorizing overtime. *Id.* at 11a-13a. The court explained that, as in the previous appeal, petitioners' "equity-based arguments" for seeking overtime pay without regard to the requirements of the governing regulation fail under this Court's decisions in *Hansen* and *Richmond*. *Id.* at 13a. The court further noted that its earlier decision did not set forth a new legal standard, but instead relied on this Court's decisions in *Hansen* and *Richmond*, which were decided before petitioners initiated this case. *Id.* at 14a.[2]

ARGUMENT

This Court denied certiorari from the initial court of appeals decision rejecting petitioners' overtime claim and ordering the entry of judgment for the government

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[2] The court of appeals also rejected petitioners' claims for AUO and holiday work pay. Pet. App. 14a-24a. Because the petition for a writ of certiorari does not challenge those rulings, petitioners have abandoned their claims for AUO and holiday pay.

in this case. *Doe* v. *United States*, 125 S. Ct. 1591 (2005) (No. 04-742). For the second time, in the context of petitioners' unsuccessful effort largely to relitigate matters resolved against them in the prior appeal, a unanimous panel of the Federal Circuit has rejected petitioners' claim for a retroactive award of hourly overtime compensation for hours of work that were not officially ordered or approved pursuant to the governing regulation. That decision, like the initial one, is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, legislation enacted during this litigation deprived the issue of prospective significance. Further review is again not warranted.

1. Petitioners contend (Pet. 2-4) that the past conduct of various Department officials should be deemed to satisfy the FEPA's requirement that compensable overtime be "officially ordered or approved," 5 U.S.C. 5542(a) (2000 & Supp. IV 2004), notwithstanding the regulatory requirement that such orders or approvals be made in writing by an authorized official, 5 C.F.R. 550.111(c). That issue lacks prospective significance.

As the court of appeals explained (Pet. App. 39a n.1), Congress enacted legislation in 1999 that prohibits the payment of premium pay to Justice Department attorneys for work performed after the enactment of that legislation:

> Notwithstanding any other provision of law, neither the United States nor any individual or entity acting on its behalf shall be liable for premium pay under title 5, United States Code, sections 5542-5549, for any work performed on or after the date of the enactment of this Act [Nov. 29, 1999] by any individual

> employed as an attorney in the Department of Justice, including an Assistant United States Attorney.

Department Appropriations Act, 2000, Pub. L. No. 106-113, § 1000a, 113 Stat. 1501A-21. The sections of Title 5 referenced by Congress include those that provide for overtime pay, see 5 U.S.C. 5542 (2000 & Supp. IV 2004), and compensatory time, see 5 U.S.C. 5543. Thus, the 1999 legislation bars the award of either overtime pay or compensatory time to Department attorneys.

In a footnote, petitioners suggest (Pet. 29 n.9) that this legislation lacks prospective effect beyond fiscal year 2000. By its express terms, however, the 1999 amendment applies to "any work performed on *or after* the date of the enactment of the Act." § 1000a, 113 Stat. 1501A-21. And the following year, Congress confirmed that the amendment "shall apply hereafter." Department of Justice Appropriations Act, 2001, Pub. L. No. 106-553, 114 Stat. 2762A-68. Thus, there is no doubt that Congress amended the substantive law, as it may do in appropriations statutes. See, *e.g.*, *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992).[3]

Petitioners contend (Pet. 5, 29) that the decisions of the court of appeals could have government-wide impact. Petitioners' theory in this case is a highly fact-specific one, however, that turns on the unique culture and practices of the Department of Justice. See, *e.g.*, Pet. 2-11. Indeed, after the trial court's original summary judgment ruling in favor of petitioners on liability, petition-

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[3] Petitioners' reliance on *Auburn Housing Authority* v. *Martinez*, 277 F.3d 138 (2d Cir. 2002), is misplaced. The *Auburn* court faced "two seemingly conflicting provisions * * * enacted as part of the same legislation," and the decision was based on those "unique circumstances." *Id.* at 146.

ers argued that the standards for interlocutory appeal were not satisfied because the trial court's ruling was "unique to the specific facts of this case," in part because other agencies compensate attorneys for overtime. Plaintiffs' C.A. Response to Pet. for Permission to Appeal 10, 19. Petitioners similarly argued that the Justice Department is the "glaring exception" to agencies' payment of overtime to attorneys. 03-5075 C.A. Appellee Br. 13.

The trial court's summary judgment ruling had broad significance because it potentially authorized employees throughout the government to claim unknown amounts of overtime pay for work that had *not* been explicitly ordered or approved through official channels. But there is no reason to believe that the court of appeals' decisions sustaining the controlling regulation will have any practical impact outside of this case.

2. In addition to lacking prospective significance, the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.

a. The regulation that has always governed the availability of overtime compensation under the FEPA validly requires that compensable overtime "be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated." 5 C.F.R. 550.111(c). Congress vested the Civil Service Commission and its successor, OPM, with authority to prescribe regulations to administer the FEPA. See 59 Stat. 304; 5 U.S.C. 5548. Under established principles of administrative law, their regulations are entitled to deference. See *United States* v. *Mead Corp.*, 533 U.S. 218, 227-230 (2001); *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

Indeed, particular deference is warranted because the overtime regulation—issued within days of the FEPA's effective date—represents the contemporaneous interpretation of the statute by the principal Executive Branch advocate of the legislation, to which Congress expressly delegated rulemaking authority. See Pet. App. 61a; *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 477 (1979) ("A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent.").

The regulation reasonably implements the FEPA's directive that compensable overtime be "officially ordered or approved." 5 U.S.C. 5542(a) (2000 & Supp. 2004). Whereas the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, authorizes compensation for overtime work that was merely "suffer[ed] or permitt[ed]," 29 U.S.C. 203(g), the FEPA's requirement that compensable hours be "officially ordered or approved" contemplates a formal mechanism for ensuring control over liability for overtime. Because "FEPA does not specify the form in which overtime must be 'ordered or approved,'" however, the court of appeals correctly concluded that the statute leaves a gap for the agency charged with its administration to fill. Pet. App. 55a.

The Civil Service Commission's contemporaneous regulation responds directly to concerns expressed by Congress during the hearings on the FEPA. During the 1945 hearings before the House Committee on Civil Service, members of Congress expressed concern to Arthur Flemming of the Civil Service Commission that the proposed legislation could allow federal agencies to incur overtime liability beyond the scope of their budgets. *Salary and Wage Administration in the Federal Ser-*

vice: Hearing on H.R. 2497 and H.R. 2703 Before the House Comm. on the Civil Service, 79th Cong., 1st Sess. 50-51 (1945) (*House Hearings*). Representative Miller suggested that the budgetary process might permit adequate oversight and control because agency budgets would have to specify the amounts allotted for overtime compensation. "[T]he final check," he observed, "is the money that will have to be very definitely set up in the budgets of the departments for overtime pay." *Id.* at 51.

Representative Vursell, however, was uncertain that specifying overtime in agency budgets would adequately ensure congressional control over expenditures. He pointed out that Congress had "deficiency appropriations brought in rather regularly." *House Hearings* 51. Thus, Representative Vursell was "fearful that you don't have that check." *Ibid.* In response, Commissioner Flemming assured Congress that the requirement that compensable overtime be "officially ordered or approved" would prevent the government from becoming subject to unexpected monetary liability. *Ibid.* He explained that, "speaking now for my own agency, I know that the regulations under which overtime is ordered and compensated for are very strict, and in most instances requests for approval have to come all the way to the top." *Ibid.* And he added that, "under normal conditions, when appropriations would be much tighter than they are at the present time, the head of the agency, I can assure you, would put even stricter controls on than he might at the present time. If he didn't he would find himself in a position where he couldn't meet his pay roll." *Ibid.*

In short, Congress intended that overtime compensation would be paid only as specifically authorized by agency officials responsible for observing budgetary

constraints. Under no circumstances was Congress to be presented with requests for deficiency appropriations. In light of that legislative history, the court of appeals correctly recognized that the implementing regulation "serves an important purpose of the statute—to control the government's liability for overtime," "so as not to subject the Treasury to unanticipated liabilities." Pet. App. 60a.

b. The petition does not contest the facial validity of the governing regulation, but nonetheless contends (Pet. 17-26) that the government must pay retroactive compensation to a class of more than 9000 for overtime that was never ordered or approved in writing by an authorized official, as required by the governing regulation. Petitioners assert (Pet. 24-26) that the past conduct of various Department officials estops the government from relying on the statutory and regulatory requirements—requirements that were designed to protect the Treasury from "unanticipated liabilities." Pet. App. 60a.

That argument lacks merit. Even accepting for the sake of argument petitioners' characterization of the past conduct, their argument fails under *Schweiker* v. *Hansen*, 450 U.S. 785 (1981) (per curiam), and *OPM* v. *Richmond*, 496 U.S. 414 (1990). Indeed, in their previous petition for a writ of certiorari, petitioners conceded that under *Hansen* and *Richmond*, "estoppel does not lie to obtain payment contrary to a valid statute or regulation." 04-742 Pet. at 14 (emphasis omitted). As this Court has explained, Congress's power to control appropriations requires that the government's monetary liability depend on statutory and regulatory requirements, not alleged estoppels contrary to those requirements. See *Hansen*, 450 U.S. at 788, 790; *Richmond*, 496 U.S. at 424.

Even if estoppel could ever lie against the government for payment of money contrary to the requirements of a statute or regulation, petitioners still miss the mark in arguing (Pet. 5, 14) that the decisions of the court of appeals will allow the federal government to "coerce volunteer work" by "repeal[ing]" the "statutory right to overtime pay." Notwithstanding such rhetoric, the only issue in this case was whether class members could demand retroactive compensation for overtime that had not been officially ordered or approved in compliance with the governing regulation—*not* whether employees could refuse to work overtime that had not been officially ordered or approved. As the trial court found, "[n]o plaintiff in this case has requested overtime, and it follows that no authorized official could have ordered or approved it." Pet. App. 77a.

Moreover, the court of appeals stressed that it was not "countenancing any effort by DOJ or any other agency to evade the requirements of FEPA and the OPM regulations." Pet. App. 65a. To the contrary, "[i]f an adverse personnel action were taken against an employee who declined to work uncompensated overtime, that action might well be found to be invalid." *Ibid.*

While petitioners now insist (Pet. 19-20) that even *voluntary* overtime is barred by the Antideficiency Act, 31 U.S.C. 1342, they did not make that argument below, the issue was not addressed by the courts below, and the issue was therefore waived. In any event, no court has ever held that voluntary overtime is barred under the Antideficiency Act, and Congress enacted the 1999 legislation barring attorney overtime pay knowing full well that many Department attorneys work extra hours without receiving (or expecting) additional compensation.

c. The circuit conflict that petitioners allege over estoppel principles (Pet. 22-23) is illusory. In all of the published decisions that petitioners cite in support of the alleged conflict, the courts *rejected* estoppel claims. Moreover, most of those cases did not even involve claims for monetary relief against the government. The petition claims (Pet. 23) that an unpublished decision of the Ninth Circuit, *Winter* v. *United States*, 93 F. Appx. 145 (2004), is "similar" to this case. But *Winter* did not concern the FEPA, and instead concluded that the government was estopped from relying on a statute of limitations. Even as to the limitations issue it did address, *Winter* is not binding precedent within the Ninth Circuit. See 9th Cir. R. 36-3. See also *Mauting* v. *INS*, 16 F. Appx. 788, 789 (9th Cir. 2001) (unpublished immigration decision, not concerning claims for monetary relief, that remanded for consideration of "colorable" estoppel claim).[4]

d. Contrary to petitioners' suggestion (Pet. 26), there was no basis for a remand to the district court "to allow the parties an opportunity to litigate under the new standard." The initial decision of the court of appeals did not announce a new standard; instead, it required adherence to the requirements of the overtime regulation that had been in place since the FEPA was enacted in 1945, and it relied on decisions of this Court that predated the filing of this lawsuit.

Although petitioners now fault the court of appeals for deciding whether their evidence satisfied the re-

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[4] Although the petition (Pet. 25) cites *Portmann* v. *United States*, 674 F.2d 1155, 1159 (7th Cir. 1982), it does not allege a conflict with that decision. *Portmann* pre-dated *Richmond*, and it distinguished *Hansen* on the theory that features of the Postal Service meant that estoppel would not "threaten the public fisc." *Id.* at 1165.

quirements of that regulation, the court of appeals reached that issue at petitioners' express invitation. See 03-5075 C.A. Appellee Br. at 34 (urging in the alternative that "the regulation was satisfied here" and that the "record abounds with orders and approvals 'in writing' by authorized officials"); *id.* at 34-37 (describing the purported evidence); *id.* at 9 (arguing that "the undisputed record demonstrates that, time and again, the Department of Justice through authorized officials, in writing, has officially approved overtime *and* ordered it"); *ibid.* (arguing that "[o]vertime was officially ordered and approved in writing by Department-wide policy statements, including the Department-wide *United States Attorneys' Manual*, and by orders to particular employees").

After carefully reviewing the "wide variety of writings" that petitioners invoked, the court of appeals concluded that "none of them includes an express directive to work overtime, and none communicates the approval of overtime work by those officials authorized to order overtime." Pet. App. 62a, 64a. The petition does not take issue with that fact-intensive determination, which would not warrant this Court's review in any event.

Moreover, as the court of appeals explained, petitioners' "alternative" legal theories are merely variants on the arguments they pressed on the first appeal. Pet. App. 12a-14a. Overtime hours are compensable under the FEPA only if the hours were "officially ordered or approved." 5 U.S.C. 5542(a) (2000 & Supp. IV 2004). On the first appeal, petitioners urged that this requirement should be deemed satisfied "if authorized officials, either before or after the fact, expected, encouraged, induced, or otherwise manifested their approval of the performance of overtime, either orally or in writing." 03-5075

C.A. Appellee Br. at 14. On the second appeal, petitioners urged that this requirement should be deemed satisfied if the Department did not have a "workable system for obtaining written authorization[.]" 05-5104 C.A. Appellant Br. at 44.

As the court of appeals explained, neither argument provides a basis for disregarding the requirements of the governing regulation. Pet. App. 13a. Petitioners had, at most, a right to refuse to work extra hours, and any adverse personnel action taken in response might well have been invalid. *Id.* at 65a. But petitioners were not free to work extra hours and then demand retroactive compensation without regard to the requirements of the regulation. *Id.* at 65a-66a. That demand is at odds with one of Congress's key purposes, to place controls on "the government's obligation to pay overtime so as not to subject the Treasury to unanticipated liabilities." *Id.* at 60a. In short, just as with the initial petition for a writ of certiorari in this case, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
Attorneys

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